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5 UNITED STATES DISTRICT COURT
6 WESTERN DISTRICT OF WASHINGTON
7 AT SEATTLE

8 IN RE: PHENYLPROPANOLAMINE
9 (PPA) PRODUCTS LIABILITY
10 LITIGATION,

MDL NO. 1407

11 This document relates to:
12 See Appendix A

ORDER GRANTING DEFENDANTS
CHATTEM, INC.'S AND THE
DELACO COMPANY'S OCTOBER 27,
2003 MOTION TO DISMISS FOR
PLAINTIFFS' FAILURE TO
COMPLY WITH COURT-ORDERED
DISCOVERY

13 THIS MATTER comes before the Court on Chattem, Inc. and The
14 Delaco Company's (collectively, "defendants") October 27, 2003
15 Motion to Dismiss for Plaintiffs' Failure to Comply with Court-
16 Ordered Discovery. On March 18, 2002, the Court entered Case
17 Management Order ("CMO") No. 6 in which the Court set a schedule
18 and protocol for conducting all case-specific fact discovery
19 within MDL 1407. Specifically, CMO No. 6 requires each plaintiff
20 to complete a Plaintiff Fact Sheet ("PFS") and serve it upon
21 Defendants within forty-five days of receipt of the PFS. On May
22 2, 2003, the Court entered CMO No. 13, requiring counsel for
23 plaintiffs naming more than one manufacturing defendant in their
24 complaint to file and serve an affirmation setting forth the PPA
25 product or products allegedly ingested by each plaintiff and the
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1 defendant or defendants whom the plaintiff claims is the manufac-
2 turer of those products. Under CMO Nos. 13 and 13A, which the
3 Court entered on June 21, 2003, a defendant who is not named in
4 the affirmation can move to dismiss the claims against it.

5 Defendants now move to dismiss the plaintiffs in the cases
6 identified in Appendix A of this Order for either failing to file
7 affirmations or Plaintiffs Fact Sheets ("PFS"), pursuant to CMO
8 6, or for failing to identify defendants' products in the affir-
9 mations or PFS that were filed. Since the time this motion was
10 filed, Defendants have informed the Court that they have with-
11 drawn the motion as to the following plaintiffs: Mildred
12 Schlegel, Carol Adams, DeAnne Fetzer, and Anna Faye Miller.
13 Having reviewed the pleadings filed in support of and in opposi-
14 tion to this motion, the Court finds and rules as follows:

15 I. DISCUSSION

16 Before dismissing a case for non-compliance with court-
17 ordered discovery, the Court must weigh five factors: (1) the
18 public's interest in expeditious resolution of litigation; (2)
19 the court's need to manage its docket; (3) the risk of prejudice
20 to the defendants; (4) the public policy favoring disposition of
21 cases on their merits; and (5) the availability of less drastic
22 sanctions. Malone v. United States Postal Serv., 833 F.2d 128,
23 130 (9th Cir. 1987). In the present case, plaintiffs have failed
24 to timely file fact sheets as required by CMO No. 6. Accord-
25 ingly, the Court finds that dismissal is appropriate in light of
26

1 the factors set forth in Malone.¹

2 First, both the public's interest in the expeditious resolu-
3 tion of litigation and the court's need to manage its docket
4 dictate dismissal. The plaintiffs subject to this Order have
5 failed to fulfill their obligation to move their cases forward.
6 Such lack of diligence does not serve the public interest in
7 expeditious resolution of litigation. See Nourish v. California
8 Amplifier, 191 F.3d 983, 990 (9th Cir. 1999) ("dismissal in this
9 instance serves the public interest in expeditious resolution of
10 litigation as well as the court's need to manage the docket
11 because Plaintiff's noncompliance has caused the action to come
12 to a complete halt, thereby allowing Plaintiff to control the
13 pace of the docket rather than the Court").

14 Second, the unreasonable delay in completing the fact sheets
15 prejudices the Defendants' ability to proceed with the cases
16 effectively. The PFS is designed to give each defendant the
17 specific information necessary to defend the case against it.
18 Without that discovery device, a defendant is unable to mount its
19 defense because it has no information about the plaintiff or the
20 plaintiff's injuries outside the allegations of the complaint.
21 The unreasonable delay in producing this information, therefore,
22 severely prejudices the Defendants, warranting dismissal.

23
24 ¹As a result of the dismissal of plaintiffs' claims against
25 defendants for failure to comply with CMO No. 6, the Court need
26 not reach defendants' arguments with respect to plaintiffs'
alleged violations of CMO No. 13.

1 Pactalunan v. Galaza, 291 F.3d 639, 642-43 (9th Cir. 2002).

2 Third, inasmuch as the disposition of cases should be on the
3 merits, here, in light of the inability of the named plaintiffs
4 to provide any information regarding the critical elements of
5 their claims, it is impossible to dispose of the case on the
6 merits. Plaintiffs are uniquely in the possession of the infor-
7 mation being sought. Their inability or unwillingness to furnish
8 this information is not excusable. See In re Exxon Valdez, 102
9 F.3d 429, 433 (9th Cir 1996) ("policy [of disposing cases on
10 their merits] lends little support to appellants, whose total
11 refusal to provide discovery obstructed resolution of their
12 claims on the merits.").

13 Last, there are no less drastic sanctions remaining. All
14 the plaintiffs at issue have received warning letters from the
15 defendants. The Court has already imposed the sanction of
16 preventing remand of the cases where discovery requirements have
17 not been met. See CMO 10 ¶ 2 (Nov. 21, 2002). The Court also
18 ordered that the time for completing case-specific discovery will
19 not begin to run until a substantially complete PFS has been
20 provided to defendants. Id. ¶ 3. In the situation where the
21 Court has been lenient and provided plaintiffs with second and
22 third chances following procedural defaults, "further default[]
23 may justify imposition of the ultimate sanction of dismissal with
24 prejudice." Malone, 833 F.2d at 132 n.1 (quoting Callip v.
25 Harris County Child Welfare Dep't, 757 F.2d 1513, 1521 (5th Cir.
26 1985)).

ORDER

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1 The Court received oppositions on behalf of only three
2 plaintiffs: Sara Williams, Doris Bonds and Linda DeWoody. Plain-
3 tiff Sara Williams does not claim to have filed a PFS, but draws
4 the Court's attention to a motion to amend her complaint to
5 substitute another defendant for Chattem, Inc. and The Delaco
6 Company. This motion has been granted, and defendants' motion is
7 moot as to Sara Williams.

8 Counsel for Doris Bonds and Linda DeWoody filed an opposi-
9 tion for these two plaintiffs. With respect to Doris Bonds, whose
10 PFS was served only after defendants' motion was filed, counsel
11 explains that he suffered serious injuries in February and June
12 of 2003, and was unable to return to work until August of that
13 year. With respect to Linda DeWoody, he concedes that she has yet
14 to submit a PFS, but indicates that he has been unable to reach
15 her. Defendants point out in reply that each of these plaintiffs
16 received warning letters, and that at no time did counsel contact
17 defendants to request an extension of time. Plaintiffs' failure
18 comply with court-ordered discovery, and failure to seek addi-
19 tional time within which to do so, is inexcusable for all the
20 reasons stated above.

21 Accordingly, the Court finds it appropriate to dismiss the
22 named plaintiffs' claims against defendants with prejudice. For
23 the foregoing reasons, defendants' motion to dismiss for failure
24 to comply with court-ordered discovery is GRANTED. The claims by
25 the plaintiffs listed in Appendix A against Chattem, Inc. and The
26 Delaco Company are DISMISSED with prejudice.

ORDER

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1 DATED at Seattle, Washington this 22nd day of January, 2004.
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3 s/ Barbara Jacobs Rothstein
4 BARBARA JACOBS ROTHSTEIN
5 UNITED STATES DISTRICT JUDGE
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Exhibit 1

	A	B	C	D	E	F	G	H	I	J	K
	NDC Docket Number	Case Name	Plaintiff Name	State	Date Action Commenced	Date Docketed in MDL	PFS Date Due	PFS Date Rec'd	PFS Date Warning Letter Sent	Affir- mation Due Date	Affir- mation Date Received
1	C03-610	McColley, Sheila Marie	McColley, Sheila Marie	NJ	11/04/02	06/15/03	08/18/03		09/12/03	no aff. due	
6	C03-0630	Small, Kametha	Small, Kametha	TX	11/06/02	06/14/03	08/18/03		09/12/03	no aff. due	
8	C03-1101	Britton, Sandra	Allen, Linda	MS	02/12/03	07/03/03	09/15/03		09/22/03	08/02/03	
9	C03-1101	Britton, Sandra	Bailey, Mike	MS	02/12/03	07/03/03	09/15/03		09/22/03	08/02/03	
10	C03-1101	Britton, Sandra	Blackwelder, Josie	MS	02/12/03	07/03/03	09/15/03		09/22/03	08/02/03	
11	C03-1101	Britton, Sandra	Britton, Sandra	MS	02/12/03	07/03/03	09/15/03		09/22/03	08/02/03	
12	C03-1101	Britton, Sandra	Burns, Laura L.	MS	02/12/03	07/03/03	09/15/03		09/22/03	08/02/03	
13	C03-1101	Britton, Sandra	Cook, Loretta	MS	02/12/03	07/03/03	09/15/03		09/22/03	08/02/03	
14	C03-1101	Britton, Sandra	Couch, Mary Sue	MS	02/12/03	07/03/03	09/15/03		09/22/03	08/02/03	
15	C03-1101	Britton, Sandra	Daniels, Nona	MS	02/12/03	07/03/03	09/15/03		09/22/03	08/02/03	
16	C03-1101	Britton, Sandra	Doh, Musa	MS	02/12/03	07/03/03	09/15/03		09/22/03	08/02/03	
17	C03-1101	Britton, Sandra	Harris, Deborah	MS	02/12/03	07/03/03	09/15/03		09/22/03	08/02/03	
18	C03-1101	Britton, Sandra	Kaylor, American	MS	02/12/03	07/03/03	09/15/03		09/22/03	08/02/03	
19	C03-1101	Britton, Sandra	Madison, Willie	MS	02/12/03	07/03/03	09/15/03		09/22/03	08/02/03	
20	C03-1101	Britton, Sandra	Morris, Peggy Lynn	MS	02/12/03	07/03/03	09/15/03		09/22/03	08/02/03	
21	C03-1101	Britton, Sandra	Morris, Roy Wayne	MS	02/12/03	07/03/03	09/15/03		09/22/03	08/02/03	
22	C03-1101	Britton, Sandra	Otis, Daniel	MS	02/12/03	07/03/03	09/15/03		09/22/03	08/02/03	
23	C03-1101	Britton, Sandra	Pharo, Diana J.	MS	02/12/03	07/03/03	09/15/03		09/22/03	08/02/03	
24	C03-1101	Britton, Sandra	Powers, Carl	MS	02/12/03	07/03/03	09/15/03		09/22/03	08/02/03	
25	C03-1101	Britton, Sandra	Roberts, Rosa L.	MS	02/12/03	07/03/03	09/15/03		09/22/03	08/02/03	
26	C03-1101	Britton, Sandra	Rosemond, Betty C.	MS	02/12/03	07/03/03	09/15/03		09/22/03	08/02/03	
27	C03-1101	Britton, Sandra	Strong, Leigh	MS	02/12/03	07/03/03	09/15/03		09/22/03	08/02/03	
28	C03-1101	Britton, Sandra	Sutton, Lois	MS	02/12/03	07/03/03	09/15/03		09/22/03	08/02/03	
29	C03-1101	Britton, Sandra	Walker, Pamela	MS	02/12/03	07/03/03	09/15/03		09/22/03	08/02/03	
30	C03-1101	Britton, Sandra	Walker, Toni	MS	02/12/03	07/03/03	09/15/03		09/22/03	08/02/03	
31	C03-1101	Britton, Sandra	Williams, Majoriette	MS	02/12/03	07/03/03	09/15/03		09/22/03	08/02/03	
32	C03-1101	Britton, Sandra	Wilson, Beverly	MS	02/12/03	07/03/03	09/15/03		09/22/03	08/02/03	
33	C03-1101	Britton, Sandra	Witcher, Desda	MS	02/12/03	07/03/03	09/15/03		09/22/03	08/02/03	
34	C03-0390	Banks, Kathleen Lashawn	Banks, Kathleen Lashawn	AL	11/04/02	04/10/03	08/15/03		08/27/03	06/02/03	05/14/03
35	C03-1342	Kell, Eunice Diane	Kell, Eunice Diane	AL	11/02/02	07/18/03	09/15/03		09/22/03	no aff. due	05/12/03

Exhibit 1

	MDI Docket Number	Case Name	Plaintiff Name	State	Date Action Commenced	Date Docketed in MDI	P/S Date Due	P/S Date Rec'd	P/S Date Warning Letter Sent	Affir- mation Due Date	Affir- mation Date Received
36	C03-1094	Hill, Demetrius S.	Hill, Demetrius S.	AL	11/05/02	07/18/03	09/15/03		09/22/03	no aff. due	05/14/03
37	C03-0598	Bonds, Doris	Bonds, Doris	MS	12/27/02	04/30/03	08/18/03		09/12/03	06/02/03	06/25/03
38	C03-0596	Dewoody, Linda	Dewoody, Linda	MS	01/03/03	04/29/03	08/18/03		09/12/03	no aff. due	07/08/03